AEH CAPITAL SDN BHD

v.

AM-EL HOLDINGS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[SUMMONS NO: S2-24-2274-1999]
2 OCTOBER 2000

MONEYLENDERS: *Interest - Excessive interest - Interest in excess of 12% per annum on secured loan - Whether plaintiff moneylender in breach of s. 22 Moneylenders Act 1951 - Whether loan in respect of share financing - Whether exemption under s. 2A(2) applicable*

The plaintiff was a licensed moneylender. The defendant defaulted under a loan agreement with the plaintiff. The plaintiff applied by way of these proceedings to realise the security charged under the loan agreement. The defendant contended that as the loan was a secured loan the plaintiff ought not to have charged an interest of 24.73%, *ie,* in excess of 12% per annum, contrary to s. 22 of the Moneylenders Act 1951 ('the Act'). Against this, the plaintiff contended that as the loan was in respect of a share financing scheme to purchase the paid-up capital of a company called Mahabudi Development Sdn Bhd ('Mahabudi'), it was exempted pursuant to s. 2A(2) of the Act for a period of three years. The plaintiff referred to the directors' circular resolution of the defendant in proof of the share financing scheme.

Held:

[1] The plaintiff failed to annex any security documents to any affidavit to show that the loan was indeed in respect of a share financing scheme to purchase the paid-up capital of Mahabudi.

[2] The directors' circular resolution of the defendant referred to by the plaintiff might well have stated that the purpose of the loan was to part finance the purchase of the fully issued and paid-up capital of Mahabudi. But when a specific challenge was taken by the defence on whether the plaintiff could take advantage of the exemption provided by s. 2A(2) of the Act, the onus was on the plaintiff to produce evidence to satisfy that challenge. Therefore, as the share purchase agreement was not exhibited to show that the loan was limited to share financing, the plaintiff could not be exempted from the Act.

[Foreclosure proceedings dismissed.]

Legislation referred to:
Moneylenders Act 1951, ss. 2A(2), 22

For the plaintiff - Mazlin Haslinda Mohammed; M/s Wong Lu Peen & Tunku Alina
For the defendant - TS Marbeck (Yahna SG with him); M/s TS Marbeck & Co

Reported by Usha Thiagarajah

JUDGMENT

RK Nathan J:

Facts

By way of a letter dated 17 May 1996 the defendant applied to the plaintiff for a loan of RM4 million and offered as security:

(a) 1st party assignment over 47 units of condominiums known as Setapak Ria Condominium held under Master Title Geran 465, Lot 1130, Mukim of Setapak, Negeri Wilayah Persekutuan.

(b) An irrevocable call/put option to purchase 30% of the issued and fully paid shares of Mahabudi Development Sdn Bhd (Mahabudi) for RM4 million. This option to be effective upon occurrence of a default of the loan.

(c) A Corporate Guarantee of Tempamas Sdn Bhd.

(d) A personal guarantee by one Low Koon Chuan, Michael.

By a letter of offer dated 24 May 1996 the plaintiff granted the defendant a term loan of RM4 million on the following, *inter alia*, terms and conditions:

Purpose	:	To part finance purchase of the fully issued and paid-up capital of Mahabudi.
Interest Rate	:	At 24.73% per annum ("Prescribed Rate") *ie*, RM748,000-00 (Ringgit Seven Hundred Forty Eight Thousand Only) and is payable upfront on the date of drawdown of TL.
Advisory Fee	:	At 4% flat on the loan amount ie. RM160,000.00 (Ringgit One Hundred Sixty Thousand Only) and is payable upfront on the date of drawdown of TL.
Drawdown	:	In one lump sum on June 5, 1996.
Tenure/ Repayment	:	Repayable in one lump sum 9 months from the date of first drawdown ie. March 5, 1997.

A loan agreement between the parties was executed on 4 June 1996. As the defendant defaulted the plaintiff applied by way of these proceedings for an order for sale of the 47 units of condominiums. It is not in dispute that the plaintiff is a licensed moneylender.

Findings Of The Court

The defence contended that by charging an interest at 24.73%, the plaintiff had breached s. 22 of the Moneylenders Act 1951 (the Act) because as the loan in question was a secured loan the plaintiff ought not to have charged interest in excess of 12% per annum. The plaintiff however pointed out that the minister of housing and local government had, pursuant to s. 2A(2) of the Act exempted the plaintiff from the Act for a period of three years with effect from 9 March 1996 provided that:

(a) the activities of the moneylender shall be limited to:

(i) credit leasing; and

(ii) share financing.

Whilst the plaintiff contends that the purpose of the loan was to facilitate a share financing transaction, unfortunately the plaintiff has failed to annex any security documents to any affidavit to show that the loan is indeed in respect of a share financing scheme to purchase the paid-up capital of Mahabudi. There is no evidence of the price of the share, etc. On the contrary there is a clear averment by the defendant in encl. 12 that it had not entered into any agreement with Mahabudi to purchase its shares. Counsel for the defendant frankly conceded that the share purchase agreement had not been exhibited. However, she referred me to the directors' circular resolution of the defendant, which stated that the purpose of the loan was to part finance the purchase of the fully issued and paid-up capital of Mahabudi. That may well be so but when a specific challenge has been taken by the defence as to the ability of the plaintiff to take advantage of the exemption provided by s. 2A(2) of the Act, the onus is on the plaintiff to produce evidence to satisfy that challenge. The plaintiff can only be exempted from the Act if it can show that the loan was limited to share financing. The agreement as such has not been exhibited.

In the circumstances, I dismissed the foreclosure proceedings with costs.